The same analysis also applies to Plaintiff's contention that he did not advance toward the agents in the kitchen/dining room or move toward the open window. Pl.'s Facts ¶ 32. In those split-second moments prior to firing his gun, SA Mihalek did his best to assess the situation and concluded that either his fellow agents were in danger of being harmed or killed by an armed man who *appeared* to be advancing toward them, or the individual was attempting to escape through an open window. In the moments leading up to shooting Plaintiff, this belief was reasonable. The Supreme Court's decision in *Tennessee v. Garner*, 471 U.S. 1, 3 (1985), further supports the notion that Defendants acted objectively reasonably, holding that deadly force may be used if "it is necessary to prevent the escape and he has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."

Plaintiff further denies that the gun and printer thrown from the open apartment window were thrown by him. Pl.'s Facts ¶ 43. However, this is not a material fact with any bearing on whether SAs Mihalek or Rizza acted objectively reasonably. Since the objects were thrown *after* the agents shot Plaintiff, *id.* at ¶ 71, the exact details of who threw the gun and printer from the open window do not affect the analysis of whether Defendants acted reasonably in shooting Plaintiff, except insofar as perhaps casting marginal doubt as to whether Plaintiff was *actually* brandishing a gun—which, in any case, is not a material fact as explained previously.

Additionally, Plaintiff denies hearing the agents issue verbal commands or warnings prior to shooting him. *Id.* at ¶ 31. However, this fact is also immaterial. Even if the Court were to resolve this fact in favor of Plaintiff—meaning, assume either no verbal commands were given, or there was such a commotion that Plaintiff did not register any verbal commands given by the agents—SAs Mihalek and Rizza *still* acted objectively reasonably. The use of deadly force is justified against an imminent threat of death or serious bodily harm. What posed this threat of serious harm

was the reasonable belief that Plaintiff was armed and was advancing on other agents or attempting to escape. Particularly since the time between this threat being identified and the first shot being fired was just a few seconds, it would be reasonable for the agents to not have had time to shout verbal warnings before having to act. It would also have been reasonable for Plaintiff to be so caught up in the commotion that he simply did not register the few verbal warnings that could have occurred in this short time span. Moreover, if anything, the fact that Plaintiff denies hearing verbal commands to get down *supports* the reasonableness of the agents' decision to shoot him, since it indicates that Plaintiff, whom Defendants believed was armed, advanced towards the agents in the kitchen rather than take actions to show he was not a threat to them, such as getting down on the ground.

Plaintiff may even attempt to dispute whether SAs Mihalek or Rizza actually believed the very facts they have stated they believed at the time of the search, such as the belief that Plaintiff was armed or that Plaintiff was advancing on the agents. However, this would constitute the resting on "mere allegations or denials of the adverse party's pleadings" that Fed. R. Civ. P. 56(e) prohibits. *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.").

Taken together, the circumstances show that SAs Mihalek and Rizzo acted objectively reasonably. At the very least, the undisputed facts, even resolved in Plaintiff's favor, certainly do not give rise to a situation in which *no* reasonable officer could possibly disagree on the legality of their actions. Thus, Defendants are entitled to qualified immunity and summary judgment.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment to Defendants.

WRITING SAMPLE OF SARAH WINSLOW
NEW YORK UNIVERSITY SCHOOL OF LAW
J.D. CLASS OF 2022

Draft of a Motion for Preliminary Order of Forfeiture, submitted with the express permission of Assistant United States Attorney Rachael Jones.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA vs. [redacted],	[redacted]

MOTION FOR PRELIMINARY ORDER OF FORFEITURE

The United States of America respectfully moves under Fed R. Crim. P. 32.2(b) for an order of forfeiture against [redacted] as part of his sentence. In support of this motion, the government states:

I. FACTS

A. The Charge and Conviction

On [redacted], a Grand Jury indicted [redacted] with possession with intent to distribute less than 50 kilograms of marijuana (Count One), in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(D) and possession of a firearm in furtherance of a drug trafficking crime. (Count Two). (Dkt. No. 3)

The Indictment contained a Forfeiture Notice under 21 U.S.C. § 853(a) of "property constituting or derived from proceeds obtained, directly or indirectly, as a result of the offense and any property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, the offense" in violation of 21 U.S.C. § 841.

Under a plea agreement, [redacted] pleaded guilty to possession with intent to distribute less than 50 kilograms of marijuana (Count 1) of the Indictment.

In his plea, [redacted] admitted that:

> On July 24, 2019, in the Dallas Division of the Northern District of Texas, [he] knowingly and intentionally possessed with intent to distribute a Schedule I controlled substance, nameless less than 50 kilograms of marijuana. Specifically, [he] possessed approximately 5 pounds of marijuana, separated into six different vacuum-sealed packages, multiple plastic baggies of different sizes, rubber bands, two cellular telephones, a scale, a loaded Glock model 43 9x19 caliber firearm possessed in furtherance of his drug trafficking crime, and $10,200 in United States currency.

The United States seeks forfeiture of $11,330.00 in United States Currency seized from his vehicle on July 24, 2019 and July 30, 2019, as property traceable to [redacted] possession with intent to distribute less than 50 kilograms of marijuana.

As described in detail below, the DPS officers seized these funds from [redacted] vehicle during the same July 24, 2019 and July 30, 2019 searches and seizures in which the DPS officers seized the other items sought for forfeiture. The evidence, including the testimony provided by [redacted] mother and pay stubs entered into evidence at the defendant's detention hearing, shows that the $11,3300.00 represents proceeds of [redacted] possession with intent to distribute less than 50 kilograms of marijuana.

B. $11,330.00 are proceeds of [redacted] offense

The facts showing that the $11,330.00 represent proceeds from [redacted] possession with intent to distribute less than 50 kilograms of marijuana are outlined in the

attached declaration of [redacted], Special Agent with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).

That declaration shows:

- On July 24, 2019, [redacted] possessed approximately six pounds of marijuana in his vehicle with the intention of distributing it. On July 30, 2019, [redacted] possessed approximately one pound of marijuana.
- On July 24, 2019, [redacted] vehicle also contained common distribution tools, including: a scale, vacuum-sealed plastic bag to contain the marijuana, a loaded gun, plastic baggies of different sizes, and two cellular telephones, in addition to the $10,200.00 in cash. On July 30, 2019, an additional $1,130.00 in cash and similar items were found.
- Based on [redacted] experience as an AFT Special Agent, the contents of this vehicle suggest [redacted] was distributing marijuana from his vehicle.
- Texas Workforce Commission showed no employment income reported for [redacted] since January 2017, at the latest.
- [redacted] mother testified that his only source of employment is at the family rehabilitation business, where he receives a small salary unable to account for the amount of cash found in [redacted] vehicle, according to verified pay stubs.

II. ARGUMENT

A. Forfeiture is Mandatory

Forfeiture is a mandatory part of [redacted] sentence. Rule 32.3(b)(1)(A)

provides that "As soon as practical after a verdict . . . on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute."

The applicable forfeiture statute is 21 U.S.C. § 853(a). Under that statute, when a defendant is convicted of violating 21 U.S.C. § 841(a)(1) and (b)(1)(D), he "*shall* forfeit to the United States . . . any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation" and "any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation" (emphasis added). Congress has also directed that "The provisions of [Section 853] shall be liberally construed to effectuate its remedial purposes." 21 U.S.C. § 853(o).

The Supreme Court, Fifth Circuit, and many sister circuits have made clear that when a statute uses the word "shall," Congress has imposed a mandatory duty upon the subject of the command. *United States v. Monsanto*, 491 U.S. 600, 607 (1989) ("Congress could not have chosen stronger words [in Section 853] to express its intent that forfeiture be mandatory in cases where the statute applied."); *see also United States v. Olguin*, 643 F.3d 384, 396 (5th Cir. 2011) (citing *Monsanto*, 491 U.S. at 607); *United States v. Newman*, 659 F.3d 1235, 1240 (9th Cir. 2011) (stating that, subject to constitutional limitations, the district court has no discretion to reduce or eliminate mandatory criminal forfeiture.); *United States v. McGinty*, 610 F.3d 1242, 1246 (10th Cir. 2010) ("[C]riminal forfeiture is not a matter within the court's discretion.").

B. Forfeiture Procedures

Rule 32.2 provides the procedure for forfeiting property. Under that rule, after a finding of guilty, the court must "determine what property is subject to forfeiture under the applicable statute." Fed. R. Crim. P. 32.2(b)(1)(A). The court must determine this "as soon as practical after a verdict or finding of guilty. *Id.*

"[The] court's determination may be based on evidence already in the record . . . and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable." Fed. R. Crim. P. 32.2(b)(1)(B). Such information may include reliable hearsay. *See United States v. Capoccia*, 503 F.3d 103, 109-10 (2d Cir. 2007) (stating that Rule 32.2(b)(1) allows the court to consider "evidence or information," making it clear that the court may consider hearsay, which is consistent with forfeiture being part of the sentencing process where hearsay is admissible); *see also United States v. Gaskin*, 364 F.3d 438, 462-463 (2d Cir. 2007) (affirming the consideration of circumstantial evidence introduced post-trial in forfeiture proceedings as "additional evidence" under 32.2(b)(1)); *United States v. Evans*, No. 4:15-CR-15-2, at *3-4 , 2017 U.S. Dist. LEXIS 20150 (S.D. Tex. Feb. 13, 2017) ("Since forfeiture is a part of the sentencing process, the Federal Rules of Evidence do not apply, and hearsay is admissible." (citing *Capoccia*, 503 F.3d at 109-10)).

"If the forfeiture is contested, on either party's request the court must conduct a hearing after the verdict or finding of guilty." Fed. R. Crim. P. 32.2(b)(1)(B). The government must establish the forfeiture by a preponderance of the evidence. *United States v. Gasanova*, 332 F.3d 297 (5th Cir. 2003) ("We . . . join all other circuit courts of

appeals . . . and conclude that statutorily-prescribed forfeiture is warranted upon a showing of a preponderance of the evidence."); *United States v. Bader*, 678 F.3d 858, 893 (10th Cir. 2012); *Gaskin*, 364 F.3d at 462.

If this Court "finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture . . . directing the forfeiture of specific property." Fed. R. Crim. P. 32.2(b)(2)(A). Importantly, "[u]nless doing so is impractical, the Court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4)." Fed. R. Crim. P. 32.2(b)(2)(B). Finally, Rule 32.2(b)(4)(B) provides that the court "must also include the forfeiture order, directly or by reference, in the judgment." The court should not postpone determining the amount subject to forfeiture until after sentencing. *See United States v. Martin*, 662 F.3d 301, 308-09 (4th Cir. 2011) (although not fatal, it was error for the district court to determine the amount subject to forfeiture before sentencing, but not to enter the order of forfeiture until 30 days after sentencing).

In accordance with the provisions of Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure, the United States requests that it be permitted to undertake whatever discovery is necessary to identify, locate, or dispose of property subject to forfeiture.

C. The role of circumstantial evidence in identifying forfeitable proceeds.

A lack of legitimate income provides circumstantial evidence that cash found at a drug dealer's residence represents drug proceeds or was to be used to facilitate a drug transaction. For example, in *United States v. Betancourt*, 422 F.3d 240, 251-52 (5th Cir.

2005), a court considered whether a lottery ticket was purchased with proceeds of drug trafficking. The court held that the ticket was purchased with proceeds and upheld the order of forfeiture. It based its finding on the fact that (1) the defendant failed to file tax returns, and (2) no state records existed showing that the defendant was involved in any legitimate business. Consequently, the court held "there is no evidence that [the defendant] had any legitimate income with which he could have acquired his interest in the lottery ticket" and that "as a matter of logic that the money used to acquire the interest came from drug sales."

Other courts have also found the lack of legitimate income persuasive. *See United States v. Hernandez*, 417 F. App'x 416, 418 (5th Cir. 2011) (unpublished) (holding that manner or home purchase using multiple cashier's checks and lack of legitimate income within three years of the purchase as shown by federal and state records and testimony of IRS agent established by a preponderance of the evidence that home was purchased with drug trafficking proceeds); *United States v. U.S. Currency in Amount of $43,920.00*, No. CIV.0800649, 2010 WL 1486005, at *3 (W.D. Mo. Apr. 14, 2010) (unpublished) (holding that money found in claimant's home was forfeitable as criminal proceeds because claimant's "sole source of income during the relevant time frame was from the sale of falsified documents"); *United States v. Green*, No. 08CR44, 2012 WL 113488, *4 (E.D. Pa. Jan. 12, 2012) (unpublished) (holding that the defendant's lack of other sources of income at the time he committed identify theft and credit card fraud and acquired a Mercedes, combined with the suspicious nature of defendant's documentation of the

purchase, was sufficient circumstantial evidence to establish that the vehicle was purchased with criminal proceeds).

D. The preponderance of the evidence shows that the $11,330.00 is proceeds of [redacted] drug trafficking offense.

The circumstantial evidence here shows that the funds seized from [redacted] vehicle were either the proceeds of marijuana sales or money intended to be used to further that crime. The cash was found in close proximity to the marijuana and drug paraphernalia commonly used as tools for distribution. These findings suggest that [redacted] distributed marijuana out of this vehicle, and that the cash was either the proceeds of these sales or intended to be used in furtherance of these sales.

Furthermore, statements and evidence from [redacted] detention hearing indicate further that the $11,330.00 seized are the proceeds of his drug trafficking crime. Special Agent [redacted] found no employment records with the Texas Workforce Commission for [redacted] since January 2017 at the latest. Additionally, [redacted] mother testified that during this gap in his employment, she payed [redacted] a "little salary" to work limited hours at the family's rehabilitation business. She also testified that [redacted] had no other job to her knowledge and indicated that the $11,330.00 cash seized from [redacted] car could not be attributed to the salary he received from her. Additionally, the Defense entered [redacted] paystubs from his work at the family business into evidence, which amounted to approximately $800 per week. The record thus strongly suggests that [redacted] has no source of legitimate income that could reasonably account for the amount of cash seized from his vehicle.

Also relevant to this analysis is that in May of 2019, [redacted] was arrested at Dallas Love Field with approximately $10,000.00 cash and a stolen firearm while going through TSA security. The United States currency smelled like marijuana. [redacted] was travelling with only a backpack to New York City via a hastily purchased one-way ticket.

Taken together, this evidence demonstrates, by a preponderance of the evidence, that the funds were the proceeds of marijuana sales or money intended to facilitate that crime and are thus subject to forfeiture under 21 U.S.C. § 853(a).

III. CONCLUSION

Based on the defendant's plea agreement the court should order him to forfeit the $11,330.00 because the evidence shows that it is proceeds of the defendant's criminal activity.

The United States respectfully requests then that this Court enter an Order of Forfeiture, forfeiting to the United States the property described above, and order the Bureau of Alcohol, Tobacco, Firearms, and Explosives, or its agent, to maintain custody of the forfeited property in accordance with the law.

Respectfully submitted,

ERIN NEALY COX
UNITED STATES ATTORNEY

/s L. Rachael Jones

L. RACHAEL JONES
Assistant United States Attorney
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1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
Telephone: 214.659.8600
E-mail: rachael.jones@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing under seal with the United States District Court Clerk for the Northern District of Texas. Counsel will automatically be sent a notice of electronic filing and has consented to receive service through electronic means.

s/ L. Rachael Jones
L. RACHAEL JONES

CERTIFICATE OF CONFERENCE

I hereby certified that I conferred with counsel, [redacted], for the defendant pursuant to the plea of guilty, she is not opposed to the forfeiture of the firearm but is opposed to the forfeiture of the $11,330.00 in United States currency.

s/ L. Rachael Jones
L. RACHAEL JONES

Applicant Details

First Name	**Madeline**
Last Name	**Zuschnitt**
Citizenship Status	**U. S. Citizen**
Email Address	**madzuschnitt@gmail.com**
Address	**Address** **Street** **2201 L St NW, Unit 316** **City** **Washington** **State/Territory** **District of Columbia** **Zip** **20037** **Country** **United States**
Contact Phone Number	**4108775443**

Applicant Education

BA/BS From	**Lafayette College**
Date of BA/BS	**May 2017**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 15, 2022**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**The George Washington Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Suter, Sonia
ssuter@law.gwu.edu
Bousquet, Daniel
dbousquet@law.gwu.edu
Wagstaff, Brandy
brandy.wagstaff@usdoj.gov
(301) 785-7562

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Madeline Zuschnitt
2201 L Street NW, Washington, D.C. 20037 | (410) 877 5443 | mzuschnitt@law.gwu.edu

April 14, 2022

The Honorable Lewis J. Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am a law student at The George Washington University Law School and will be graduating in May 2022. I am writing to apply for a judicial clerkship with you for the 2024 Term. I am enclosing a resume, a writing sample, a law school transcript, and an undergraduate transcript. Enclosed as well are recommendations from Professor Sonia Suter, Friedman Fellow Daniel Bousquet, and Brandy Wagstaff. Thank you for your time and consideration.

Sincerely,

Madeline Zuschnitt

Madeline Zuschnitt
2201 L Street NW, Unit 316, Washington, D.C. 20037 | (410) 877 5443 | mzuschnitt@law.gwu.edu

Education

The George Washington University Law School — Washington, D.C.
J.D. expected — May 2022
GPA: 4.008

Honors: George Washington Scholar (Top 1-15% of class as of Fall 2021); Dean's Recognition for Professional Development; Equal Justice America Fellow
Activities: *The George Washington Law Review*, Vol. 90 Notes Editor; Writing Fellow; Research and Teaching Assistant, Legislation and Regulation (Fall 2020)

Lafayette College — Easton, PA
B.A., *summa cum laude*, in International Affairs; minor in Spanish — May 2017
GPA: 3.96

Honors: Phi Beta Kappa; Sigma Iota Rho; Sigma Delta Pi; Rev. J.W. and R.S. Porter Bible Prize Recipient

Professional Experience

Family Justice Litigation Clinic — Washington, D.C.
Student Attorney — Aug. 2021 – Dec. 2021

- Drafted complaints, settlement letters, and mediation plans on behalf of client
- Served as volunteer student attorney-negotiator with the D.C. Superior Court
- Wrote and circulated internal memos providing supervisors with updates on case and mediation matters

Sullivan & Cromwell LLP — New York, NY
Summer Associate — May 2021 – Aug. 2021

- Conducted legal research and analysis pertaining to various labor and employment matters
- Drafted portions of a due diligence report for a potential acquisition
- Assisted individuals in the drafting of CPO petitions through a firm partnership with a local nonprofit

United States Department of Justice, Civil Rights Division — Washington, D.C.
Legal Intern, Immigrant and Employee Rights Section — Jan. 2021 – Mar. 2021

- Conducted legal research and analysis pertaining to 8 U.S.C. §1324b issues ranging from ineffective recruitment methods and investigatory file privilege, to locating analogous Title VII cases for specific alleged violations
- Corresponded with the public in response to inquiries regarding potential §1324b violations

United States Department of Justice, Civil Rights Division — Washington, D.C.
Legal Intern, Human Trafficking Prosecution Unit — Aug. 2020 – Nov. 2020

- Conducted legal research and analysis pertaining to various Human Trafficking matters ranging from jury instructions, standards of review, and evidentiary admissibility, to locating analogous case law on niche issues
- Created various discovery and jail call summary documents to be used for trial preparation

Ayuda — Washington, D.C.
Legal Fellow — May 2020 – Aug. 2020

- Drafted and filed complaints for absolute divorce, CPO petitions, proposed orders, motions for continuance, and various trial documents for supervising attorney
- Conducted legal research and analysis pertaining to complex Domestic Relations matters
- Conducted client interviews, witness preparation sessions, and client meetings in both Spanish and English

Languages and Interests

Proficient Spanish (Lived and worked in Spain for a year); Exploring New Coffee Shops; HIIT Workouts

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

SSN : ***-**-7992
GWid : G33488783
Date of Birth: 28-FEB

Date Issued: 11-FEB-2022

Record of: Madeline Biggs Zuschnitt

Page: 1

Student Level: Law
Admit Term: Fall 2019

Issued To: MADELINE ZUSCHNITT
702 WHITE SWAN DR
ARNOLD, MD 21012-1519

REFNUM:68142517

Current College(s):Law School
Current Major(s): Law

EXPERIENTIAL REQUIREMENT MET

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2019			
	Law School		
	Law		
LAW 6202	Contracts Roberts	4.00	A
LAW 6206	Torts Suter	4.00	A
LAW 6212	Civil Procedure Clark	4.00	A-
LAW 6216	Fundamentals Of Lawyering I Prakash	3.00	A
	Ehrs 15.00 GPA-Hrs 15.00 GPA 3.911		
	CUM 15.00 GPA-Hrs 15.00 GPA 3.911		
	GEORGE WASHINGTON SCHOLAR		
	TOP 1% - 15% OF THE CLASS TO DATE		
Spring 2020			
	Law School		
	Law		
LAW 6208	Property Overton	4.00	CR
LAW 6209	Legislation And Regulation Schaffner	3.00	CR
LAW 6210	Criminal Law Braman	3.00	CR
LAW 6214	Constitutional Law I Cheh	3.00	CR
LAW 6217	Fundamentals Of Lawyering II Prakash	3.00	CR
	Ehrs 16.00 GPA-Hrs 0.00 GPA 0.000		
	CUM 31.00 GPA-Hrs 15.00 GPA 3.911		
	Good Standing		
	..		
	DURING THE SPRING 2020 SEMESTER, A GLOBAL PANDEMIC CAUSED BY COVID-19 RESULTED IN SIGNIFICANT ACADEMIC DISRUPTION. ALL LAW SCHOOL COURSES FOR SPRING 2020 SEMESTER WERE GRADED ON A MANDATORY CREDIT/NO-CREDIT BASIS.		
	DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT		

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2020			
	Law School		
	Law		
LAW 6230	Evidence Kirkpatrick	3.00	A+
LAW 6538	Immigration Law Benitez	3.00	A
LAW 6666	Research And Writing Fellow Gambert	2.00	CR
LAW 6668	Field Placement	3.00	CR
LAW 6671	Government Lawyering Somers	2.00	A
	Ehrs 13.00 GPA-Hrs 8.00 GPA 4.125		
	CUM 44.00 GPA-Hrs 23.00 GPA 3.986		
	Good Standing		
	GEORGE WASHINGTON SCHOLAR		
	TOP 1% - 15% OF THE CLASS TO DATE		
Spring 2021			
LAW 6250	Corporations Fairfax	4.00	A
LAW 6380	Constitutional Law II Colby	4.00	A
LAW 6666	Research And Writing Fellow Gambert	2.00	CR
LAW 6667	Advanced Field Placement Johnson	0.00	CR
LAW 6668	Field Placement Tillipman	2.00	CR
	Ehrs 12.00 GPA-Hrs 8.00 GPA 4.000		
	CUM 56.00 GPA-Hrs 31.00 GPA 3.989		
	Good Standing		
	GEORGE WASHINGTON SCHOLAR		
	TOP 1% - 15% OF THE CLASS TO DATE		

********** CONTINUED ON PAGE 2 **********

E Edmondson
University Registrar

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THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

SSN : ***-**-7992
GWid : G33488783
Date of Birth: 28-FEB

Date Issued: 11-FEB-2022

Record of: Madeline Biggs Zuschnitt

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2021			
LAW 6218	Prof Responsibility & Ethics Berger	2.00	A+
LAW 6400	Administrative Law Glicksman	3.00	A
LAW 6624	Family Justice Litig. Clinic Kohn	6.00	A
LAW 6666	Research And Writing Fellow Blinkova	2.00	CR
Ehrs 13.00 GPA-Hrs 11.00 GPA 4.061			
CUM 69.00 GPA-Hrs 42.00 GPA 4.008			
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			
Fall 2020			
Law School			
Law			
LAW 6657	Law Review Note	1.00	----------
	Credits In Progress:	1.00	
Spring 2021			
LAW 6657	Law Review Note	1.00	----------
	Credits In Progress:	1.00	
Fall 2021			
LAW 6658	Law Review	1.00	----------
	Credits In Progress:	1.00	
Spring 2022			
LAW 6236	Complex Litigation	3.00	----------
LAW 6360	Criminal Procedure	4.00	----------
LAW 6658	Law Review	1.00	----------
LAW 6666	Research And Writing Fellow	2.00	----------
LAW 6875	Counterterrorism Law	2.00	----------
	Credits In Progress:	12.00	

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	69.00	42.00	168.33	4.008
OVERALL	69.00	42.00	168.33	4.008

########## END OF DOCUMENT ##########

Ed Edmundson
University Registrar

This transcript processed and delivered by Parchment

LAFAYETTE COLLEGE

Student No: L04229538 Date of Birth: 28-FEB Date Issued: 30-JAN-2018

Page: 1

Record of: Madeline B. Zuschnitt

Issued To: Madeline Zuschnitt
8516935A

Course Level: Undergraduate

Current Program
Bachelor of Arts
Major : International Affairs
Minor : Spanish

Comments:
Spring 16 spent in Madrid, Spain under Syracuse Univ affiliated abroad program-DEAN'S LIST

Degrees Awarded Bachelor of Arts 20-MAY-2017
Primary Degree
Major : International Affairs
Minor : Spanish
Inst. Honors: Summa Cum Laude

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:						
**********		Advanced Placement				
ENG	099	Elective Credit in English	1.00	CR		
GEOL	110	Environmental Geology	1.00	CR		
SPAN	112	Intermediate Spanish	1.00	CR		
Ehrs: 3.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
Spring 2016		Syracuse University				
A&S	224	Self, Society and Culture	0.80	A		
GOVT	336	International Conflict	0.80	A		
REL	399	Islam Conq/Christian Reconq	0.80	A		
SPAN	299	Advanced Language Usage	0.80	A		
SPAN	311	Survey Spanish Literature II	0.80	A		
Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 16.00 GPA: 4.00						
INSTITUTION CREDIT:						
Fall 2013						
FYS	021	Maleness in Contemp Culture	1.00	A	4.00	
GOVT	102	Intro International Politics	1.00	A	4.00	
MUS	150	Performance:Choir	0.25	A	1.00	
PHIL	102	Basic Social Questions	1.00	A-	3.70	
SPAN	211	Advanced Spanish	1.00	A	4.00	
********** CONTINUED ON NEXT COLUMN **********						

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Ehrs: 4.25 GPA-Hrs: 4.25 QPts: 16.70 GPA: 3.93						
Dean's List						
Spring 2014						
AMS	150	Intro to American Studies	1.00	A	4.00	
MATH	110	Statistical Concepts	1.00	A	4.00	
SPAN	314	Cont Span-Amer & Hispanics US	1.00	A	4.00	
WGS	101	Intro Women's & Gender Studies	1.00	A-	3.70	
Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 15.70 GPA: 3.93						
Dean's List						
Fall 2014						
A&S	102	Cultural Anthropology	1.00	A	4.00	
REL	102	Contemporary Religious Issues	1.00	A	4.00	
REL	215	Islam	1.00	A	4.00	
SPAN	310	Survey Spanish Literature I	1.00	A	4.00	
Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 16.00 GPA: 4.00						
Dean's List						
Spring 2015						
ECON	101	Principles	1.00	A-	3.70	
IA	261	Research Methods in IA	1.00	A	4.00	
REL	101	Religions in World Cultures	1.00	A	4.00	
SPAN	303	Spanish Civilization & Culture	1.00	A	4.00	
Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 15.70 GPA: 3.93						
Dean's List						
Fall 2015						
ENG	202	Writing Seminar	1.00	A	4.00	
PSYC	110	Introduction to Psychology	1.00	A	4.00	
REL	225	Sex, Gender and Religion	1.00	A	4.00	
THTR	201	Public Speaking	1.00	A	4.00	
Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 16.00 GPA: 4.00						
Dean's List						
Fall 2016						
ART	155	Digital Photography I	1.00	A	4.00	
GOVT	230	Int'l Politics:Middle East	1.00	A	4.00	
SPAN	315	Intro Visual Cultures Spain	1.00	A	4.00	
********** CONTINUED ON PAGE 2 **********						

From Lafayette College to zuschnim@lafayette.edu on 01/30/2018 10:59 AM TRAN0000137149 58

Francis A. Benginia, Registrar

LAFAYETTE COLLEGE

Student No: L04229538 Date of Birth: 28-FEB Date Issued: 30-JAN-2018

Record of: Madeline B. Zuschnitt

Level: Undergraduate

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
	Ehrs: 3.00	GPA-Hrs: 3.00	QPts: 12.00	GPA: 4.00		
Dean's List						
Spring 2017						
IA	362	Seminar in IA	1.00	A-	3.70	
REL	224	Religious Ethics	1.00	A	4.00	
	Ehrs: 2.00	GPA-Hrs: 2.00	QPts: 7.70	GPA: 3.85		

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	25.25	25.25	99.80	3.95
TOTAL TRANSFER	7.00	4.00	16.00	4.00
OVERALL	32.25	29.25	115.80	3.96

********** END OF TRANSCRIPT **********

From Lafayette College to zuschnim@lafayette.edu on 01/30/2018 10:59 AM TRAN0000137149 58

Francis A. Benginia, Registrar

The George Washington University Law School
2000 H Street, NW
Washington, DC 20052

April 15, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am writing in strong support of Madeline Zuschnitt's application for a judicial clerkship with you in 2022. Madeline was a student in my Torts class in the fall of 2019. Based on what I know about her as a student and person, I am confident she would make an excellent law clerk.

Madeline was one of 87 students in her Torts class. Although I had over 200 Torts students that semester (I had another large Torts class), I got to know Madeline quite well. Not only did she participate in class a good deal, she also came to office hours to discuss the material. In addition, I met with her and a group of students over lunch to get to know one another.

Throughout the semester, Madeline was engaged with the material, frequently offering her perspectives when I asked the class questions about policy issues or the black-letter law. Her comments were always intelligent and thoughtful. She was someone I could count on when I posed a difficult question to the class about a doctrinal or policy issue. Often, she noted details that were missed by other students, demonstrating that she had read the material with great care. Madeline was not someone who tried to dominate the classroom, but she spoke with quiet confidence, poise, and the authority of someone who is extremely well prepared. Not surprisingly, she also did very well when I called on her to discuss a case. Sometimes students who volunteer are very articulate about the issues they want to address, but less strong when they are called on randomly. In Madeline's case, however, she showed the same degree of understanding of the material whether I called on her or she volunteered. She was not only deft at applying the doctrine to new hypotheticals, but she was also thoughtful about the limits and reach of a particular principle and the relevant policy considerations in a particular area. Madeline demonstrated that she had a stronger understanding of the material than many of her peers. As a result, I was extremely surprised to learn that she thought she had bombed her cold-call with me in Torts. I have seen this kind of self-criticism more than once from talented students who are so demanding of themselves that they imagine they have done poorly, even though they were thoughtful and articulate in their responses. I imagine that holding herself to a very high standard has likely helped shape Madeline's success in academics and other endeavors.

Based on my impressions of Madeline's understanding of the material and her analytic abilities, I fully expected her to do well on the final examination, which she did. The exam included two complex, issue-spotting questions and a section with difficult multiple-choice questions that required careful reading and analytic reasoning. Madeline did especially well on the first, and longer, essay question, earning a score 1.14 standard deviations above the mean. In fact, the strength of her writing and legal analysis stood out, prompting me to write a note to myself (before adding up the points) that her essay should be one of the strongest ones. On the second, shorter, essay question, her score was 0.31 standard deviations above the mean. And finally on the multiple choice questions, she earned a score that was 0.8 standard deviations above the mean. Based on her exam and classroom performance, Madeline easily earned an A for the course.

With her strong work ethic, careful reading, and strength in writing, it is not surprising that Madeline has been extremely successful in all of her classes. So far, she has a GPA of 3.98, and her lowest grade has been a single A-. It is worth noting that Madeline performed very well her first semester of law school even in the face of serious adversity, something I only recently learned. The week before Thanksgiving of her first semester of law school, she lost two very close family members, on separate occasions and under tragic/unexpected circumstances. On top of that, the night before her first final exam of law school, her mother was hospitalized after a car accident. Despite these profound distractions, she took all of her finals on time and managed to earn a GPA of 3.91, further demonstrating her professionalism and ability to focus even under very difficult circumstances.

Madeline's success in law school is undoubtedly due in large part to her strong writing abilities. She was chosen to be a Writing Fellow at our Writing Center and a Notes Editor of the Law Review, evidencing leadership and competency with respect to writing, a skill that is so essential for law clerks and lawyers. She was also selected as a student-attorney for GW's Family Justice Litigation Clinic for the Fall 2020 term. Her ability to balance school and these extracurricular activities demonstrates her highly effective time-management skills.

Madeline is not only very intelligent, highly motivated, and hardworking, she is also mature, professional, organized, and a self-starter. I am sure that some of this is influenced by the fact that she worked two years prior to law school teaching English as a second language in Madrid, Spain and working as an Operations Manager for Elevate Cleans. During that period, she realized that she wanted to attend law school, something no one else in her family had done. Indeed, she attributes her internal motivation and love of learning for its own sake as a big part of her academic success. Undoubtedly this will also help her to

succeed as a law clerk and lawyer.

Finally, Madeline has the personality that would make her a valuable law clerk. She is enthusiastic, professional, and friendly. I found her to be delightful when she and a group of classmates met with me after class to get to know one another, and it was evident that she gets along very well with her peers. Madeline has the confidence to express her views, but she also listens and is respectful and open to hearing opposing arguments. I am confident that her insights and careful attention to detail will make her a valuable asset in discussions within chambers. In addition, I know she would work extremely well with everyone in chambers, including support staff, co-clerks, and her judge. With her love of legal research and writing and her strengths in this area, she will thrive in a clerkship and provide high quality work. In short, with her talents and deep commitment to working to her highest ability, I am confident that Madeline will be a fine law clerk.

If you have any questions about Madeline's application, please feel free to contact me at ssuter@law.gwu.edu or 202-994-9257.

Sincerely,

Sonia M. Suter, J.D., M.S
Professor of Law and Kahan Family Research Professor of Law
Founding Director, Health Law Initiative

The George Washington University Law School
2000 H St NW
Washington, DC 20052

April 15, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write in support of the clerkship application of Madeline Zuschnitt.

I am a visiting associate professor at The George Washington University Law School, where I have taught and supervised students since Summer 2021. I previously practiced law at Feldesman Tucker Leifer Fidell LLP and Jenner & Block LLP, both here in Washington, D.C. I clerked on the U.S. Court of Appeals for the First Circuit and graduated from Yale Law School in 2014.

I taught and supervised Maddie in the GW Family Justice Litigation Clinic in Fall 2021. I supervised her and her partner in their representation of a single mother facing contentious custody litigation. I saw Maddie at minimum once a week for extensive one-on-two supervision, met with her once a week in a 10-student seminar, and communicated with her roughly three to four times a week by email/phone.

From my extensive experience working with her, I can say with great confidence that Maddie is a superb lawyer, who would make an outstanding judicial clerk. She has an incisive legal mind, complemented by an extraordinary work ethic. In her clinic work, Maddie drafted pleadings and legal memoranda that were polished and required little revision. When you give Maddie a task, consider it done, excellently. Her work ethic is impressive; indeed, she is as hard a worker as anyone I have encountered in my legal career.

In your chambers, Maddie will deliver outstanding polished products ahead of schedule and commit herself completely to your important work. In addition, Maddie is an extraordinary and professional colleague to her coworkers. She has my highest recommendation.

Please do not hesitate to contact me if I can offer additional observations.

Best,

Daniel Bousquet

April 15, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

It is my great privilege to recommend my former intern, Madeline Zuschnitt, for a clerkship with Your Honor. I serve as intern coordinator for the Human Trafficking Prosecution Unit (HTPU) at the U.S. Department of Justice, Civil Rights Division. HTPU was formed within the Criminal Section of the Civil Rights Division in 2007 to consolidate the human trafficking prosecution expertise the Criminal Section had developed over decades of enforcing the pre-Trafficking Victims Protection Act (TVPA) involuntary servitude and slavery statutes. HTPU partners with United States Attorney's Offices nationwide to prosecute human trafficking cases involving forced labor, transnational sex trafficking, and sex trafficking of adults by force, fraud, or coercion, specializing in novel, complex, multijurisdictional, and international cases.

I had the absolute pleasure of supervising Ms. Zuschnitt during her 2020 fall internship with HTPU. In my 10 years supervising over 150 interns, Ms. Zuschnitt stands out as one of the top 10 percent, and I give her my very highest recommendation. Her exceptional work ethic and professionalism, her strong research and writing skills, and her extraordinary ability to effectively incorporate feedback and improve make her a standout. Having had the great honor of serving as a federal law clerk myself, I know without a doubt that Ms. Zuschnitt would make an outstanding law clerk and contribute significantly to your chambers.

Over the course of her 10-week internship, Ms. Zuschnitt completed a number of substantive research projects, answering questions involving multiple evidentiary issues, researching how the unit of prosecution is measured for forced labor crimes, and researching and analyzing the law regarding protective orders in human trafficking cases. In particular, her work on the protective order research memorandum stood out. She took what another intern had begun and fleshed out the research significantly, responded to comments and feedback, and revised and refined the final draft of the memorandum. The final version of this document provides prosecutors with clear guidance on when it is appropriate to seek protective orders for human trafficking victims and witnesses and under what law these protective orders can be secured. It was well-organized, clearly written, and comprehensively analyzed. This memo has been a resource that both HTPU trial attorneys and AUSAs have used a number of times over the past two years.

Ms. Zuschnitt also completed a number of time-sensitive research projects that were outstanding. She was very skilled in efficiently completing quick research and analysis and sending clearly written write-ups outlining her research results. In addition, she significantly helped one trial team with some complex discovery, reading through an extensive number of financial documents and organizing and analyzing the results into a spreadsheet. The final work product was excellent, and the trial attorney noted that the trial team was "likely going to use [her work product] as the basis for a trial exhibit." Ms. Zuschnitt also listened to a over a 100 jail calls in another case, writing up "stellar" summaries, according to the trial attorney, which assisted the trial team significantly in their investigation.

Throughout these and other projects, Ms. Zuschnitt demonstrated outstanding attention to detail, the ability to write and organize information in a clear and structured manner, and very strong research and writing abilities. Ms. Zuschnitt also impressed me with how hard working and productive she was throughout the internship. Ms. Zuschnitt always conducted herself with the utmost professionalism and proved to be extremely dependable and reliable. She worked well independently, but also instinctively knew when to check in or make follow-up inquiries to ensure she was on the right track. And, as I noted in her final evaluation, Ms. Zuschnitt is an extremely hard worker, has a very positive attitude, and is fantastic about incorporating feedback. I watched her grow tremendously in her legal research and writing skills over the course of her ten weeks with us, and I know she has continued improving since. All these
qualities would ensure a successful tenure in your chambers.

Thank you for your consideration. If you have any questions, please do not hesitate to contact me. I would love the opportunity to discuss Ms. Zuschnitt's qualifications further.

Sincerely,

Brandy Wagstaff
Legal Counsel for Litigation
Human Trafficking Prosecution Unit
(202) 307-2219
Brandy.Wagstaff@usdoj.gov

Madeline Zuschnitt
2201 L Street NW, Unit 316, Washington, D.C. 20037 | (410) 877 5443 | mzuschnitt@law.gwu.edu

WRITING SAMPLE

The following writing sample is an internal memorandum that I wrote for the trial attorneys of the Immigrant and Employee Rights Section of the Civil Rights Division of the Department of Justice in the Spring of 2021. In drafting this memorandum, I was asked to provide an overview of Title VII cases in which the respondent purposefully used ineffective recruitment methods and was found to have discriminated against a class of victims that did not apply. I was then asked to discuss the relevant legal background in relation to the facts alleged in the Immigrant and Employee Rights Section's litigation against "the company." Identifying information related to the company involved in the litigation has been removed for purposes of confidentiality. This writing sample has not been edited by any third party.

Memorandum

Subject:	Ineffective Recruitment Methods & Title VII Discrimination Against Nonapplicants	**Date:**	X
To:	Trial Attorneys	**From:**	Madeline Zuschnitt Legal Intern

I. Introduction

This memorandum proceeds in four parts. Part I consists of an explanation of Parts II, III, and IV. Part II provides an overview of Title VII cases in which the respondent purposefully used ineffective recruitment methods and was found to have discriminated against a class of victims that did not apply. Part III discusses the relevant legal background in relation to the facts alleged in IER's litigation against the company. Part IV provides a brief conclusion and summary of the information provided in Parts II and III.

II. Legal Background & Overview

The Third, Fourth, Sixth, Eight, Ninth, and Eleventh Circuits have all recognized that, under Title VII, ineffective recruitment methods may result in discrimination against a class of victims that did not apply for the specific position at issue. Courts have held that recruitment methods that are not facially neutral, such as those which rely primarily on word-of-mouth recruitment, may be categorized as discriminatory. For example, in *Domingo v. New England Fish Co.*, an employer recruited for its lower-paying positions through a Filipino union and from Alaskan villages, while recruiting for administrative workers, clerical workers, machinists, and other higher-paying positions by word-of-mouth recruitment conducted by majority white

employees. 727 F.2d 1429, 1433 (9th Cir. 1984). This resulted in the majority of those recruited by word-of-mouth being white. *Id.* The court held that evidence that an employer recruited for specific positions through word-of-mouth recruitment conducted by majority white employees, in combination with preferential treatment given to friends and relatives through that recruitment, was sufficient to establish intentional employment discrimination. *Id.* at 1436. The court then certified the plaintiff class as including all nonwhites deterred from applying for employment at the company during the applicable time period. *Id.* Additionally, in *Lams v. Gen. Waterworks Corp.*, an employer recruited solely by word-of-mouth for a period of eight years. 766 F.2d 386, 389 (8th Cir. 1985). During this time period, black employees at the company worked almost exclusively at a location at least one and one-half miles from the nearest location at which they would be able to learn of job openings through word-of-mouth. *Id.* at 391–92. Because of this, the court noted that word-of-mouth recruitment for specific personnel positions, when many potential applicants, the vast majority of whom were black, would have little opportunity to learn of job openings until after the positions were filled, was discriminatory. *Id.* at 393–94.

In conjunction with reliance on word-of-mouth recruitment, an employer's refusal to adequately advertise job openings, may be violative of Title VII. For example, in *Reed v. Arlington Hotel Co., Inc.*, a hotel refused to post notices of job openings within the hotel and instead passed news of openings through word-of-mouth. 476 F.2d 721, 724 (8th Cir. 1973). The court held that failure to alert black employees of opportunities for transfer and promotion, paired with their reliance on word-of-mouth recruitment, constituted discrimination under Title VII. *Id*. Because of this, the plaintiff was permitted to bring suit on behalf of himself and black people as a class. *Id.* at 722. Additionally, in *Kraszewski v. State Farm Gen. Ins. Co.*, a plaintiff

filed suit with the E.E.O.C., alleging that State Farm had discriminated against her and other women by failing to recruit, select, and hire women for the entry level sales position of trainee agent. No. C 79–1261 THE, 1985 WL 1616, at *1 (N.D. Cal. Apr. 29, 1985). The court commented that State Farm's failure to post job notices and advertise available trainee agent positions, while relying on word-of-mouth recruitment of a nearly all male workforce, constituted discrimination. *Id.* at *80. Further, the court then certified the class of plaintiffs as "[a]ll female applicants and deterred applicants who, at any time since July 5, 1974, have been or continue to be or may in the future be denied appointment, employment and/or training as Sales Agent Trainees by defendant companies within the State of California." *Id.*

Beyond word-of-mouth recruitment, other ineffective advertising recruitment methods may be discriminatory as well. For example, in *Wells v. Meyer's Bakery*, the plaintiff brought suit on behalf of themself, and other black persons similarly situated, alleging that an employer's practice of posting PSS (Production, Sanitation, and Shipping) vacancies in the employees' lounge, and posting maintenance and transportation vacancies only within the respective department areas, which were generally off limits to PSS employees, was discriminatory. 561 F.2d 1268, 1271 (8th Cir. 1977). The court noted that the hiring system constituted discrimination under Title VII when the form of posting of vacancies resulted in diminished opportunity for black employees to learn of departmental position vacancies. *Id.* Relatedly, in *U.S. v. City of Warren, Mich.*, an employer limited its advertising of all municipal employment opportunities to three newspapers with primary circulation in Macomb County, while refusing to advertise in any newspapers or periodicals of general circulation in the Detroit metropolitan area. 138 F.3d 1083, 1088 (6th Cir. 1998). The court held that this practice was discriminatory because it had a disparate impact on black potential job applicants, *id.* at 1094, and certified the

plaintiff class as those who would have applied for police and firefighter positions but for the discrimination. *Id.* at 1090.

Ineffective recruitment methods that perpetuate the characteristics of the current workforce may amount to unlawful discrimination. For example, in *Van v. Plant & Field Serv. Corp.*, a company relied on male word-of-mouth recruitment to advertise laborer, helper, and crafts positions. 672 F.Supp. 1306, 1308 (C.D. Cal. 1987). The court found that this word-of-mouth recruitment was discriminatory because it perpetuated a low percentage of female applicants, *id.* at 1317, and therefore allowed all women who were deterred from applying during the period of alleged discrimination to join the plaintiff class. *Id.* at 1308. Similarly, in *Barnett v. W.T. Grant Co.*, a company maintained separate hiring locations for Fleet Operation and Consolidation Operation workers, recruited for new over-the-road drivers via word-of-mouth and "walk-in" applications only, and periodically displayed a misleading sign stating that no applications were being taken at one of the locations. 518 F.2d 543, 547 (4th Cir. 1975). The court held that the word-of-mouth recruitment, the primary method of recruitment for new over-the-road drivers, was discriminatory because it perpetuated the company's all-white work force composition. *Id.* at 549. The plaintiff was able to bring suit on behalf of, among others, "all those blacks who had been kept ignorant of driver positions or discouraged from applying" for them because of the above enumerated hiring practices. *Id.* at 547.

In the context of the application process, recruitment which results in a burdensome application process for some but not others, may result in prima facie discrimination. In *E.E.O.C. v. Metal Serv. Co.*, two black individuals attempted to apply for a position through Pennsylvania Job Service, the company's outsourced hiring service, and also through the company directly. 892 F.2d 341, 344 (3rd Cir. 1990). When attempting to apply directly through the company, the

individuals were told that the company did not hire directly. *Id.* However, white employees were able to apply for a job through the company directly, after being recruited through word-of-mouth, and were not required to use the outside hiring service. *Id.* In this case, the court noted that word-of-mouth recruitment and hiring which resulted in limited applications from minority groups was circumstantial evidence indicative of discriminatory treatment. *Id.* at 350.

Even if an employer does not have an explicit policy of exclusion, if word-of-mouth and other discriminatory informal methods of recruitment are used, a nonapplicant may still recover. For example, in *Cox v. Am. Cast Iron Pipe Co.*, a company reserved clerical jobs in its all-male production plant for men, while paying employees much less for non-plant clerical jobs. 784 F.2d 1546, 1560, 1551 (11th Cir. 1986). The company was able to accomplish this through a discriminatory system in which there were no posting or announcing of vacancies, no bid systems or formal applications for jobs, and no written criteria for selection. *Id.* at 1551–52. The court reiterated that this discriminatory system of hiring resulted in sex discrimination for which a female nonapplicant could recover. *Id.*

Additionally, usage of ineffective recruitment methods because a candidate has already been preselected has been found to be discriminatory. "Evidence of preselection operates to discredit the employer's proffered explanation for its employment decision." *Goostree v. Tennessee*, 796 F.2d 854, 861 (6th Cir. 1986) (stating that preselection founded on any basis prohibited by Title VII is relevant evidence of a Title VII violation). Preselection can be evinced through an employer's deviation from its traditional hiring methods, in combination with uncharacteristically specialized position requirements. For example, in *Coble v. Hot Springs Sch. Dist. No. 6*, a female teacher filed suit claiming that the job requirements for the position of counselor at the school where she worked were drafted to specifically fit a male teacher, who had

in fact already been preselected for the position. 682 F.2d 721, 727 (8th Cir. 1982). The school district had a practice of posting notices of available positions on school bulletin boards, however in this case, the school district posted notice of the position after it had been filled. *Id.* at 728. Additionally, the job requirements for the position included both a French and counseling certification requirement, which, in reality, were not both required for the job. *Id.* The court stated that the school district's deviation from its regular practice of posting notices of available positions on bulletin boards in the school buildings, in combination with an unusual French certification requirement for the position, evinced preselection and therefore discredited the school district's proffered explanation of its candidate selection. *Id.* at 729.

In the context of 8 U.S.C. § 1324b, "a position [description] specifically tailored . . . to a non-work authorized alien's qualifications so as to exclude equally qualified U.S. citizens" may give rise to an inference of discriminatory preselection. *McNier v. San Francisco State Univ., Coll. of Bus.*, 7 OCAHO 998, 1998 WL 746018, at *9 (May 8, 1998). In *McNier*, a U.S. citizen adjunct professor filed a Complaint against his employer, a university, asserting that he had been discriminated against based on citizenship status by the university's preselection of another, less qualified and non-U.S. citizen, professor for a tenure track position. *Id.* at *1. The court noted that although nothing in I.R.C.A. obliges an employer to select a U.S. citizen over an equally qualified work-authorized alien, specific tailoring of a position description to a non-work authorized alien's qualifications so as to exclude equally qualified U.S. citizens, constitutes preselection which may give rise to an inference of discriminatory preselection in violation of 8 U.S.C. § 1324b, and that preselection is probative of discrimination. *Id.* at *9.

III. The Law as Applied to IER's matter

As previously stated, recruitment methods that are not facially neutral, such as those which rely primarily on word-of-mouth recruitment, may be discriminatory. Here, like in *Domingo*, where an employer relied on one form of recruitment (word-of-mouth) for machinist and administrative positions, but another form of recruitment for lower paying jobs (through an ILWU Local), the company uses separate recruiting methods based on the immigration status of the candidate that it wants to emerge from recruitment. The company uses one recruitment process for positions created because of a legitimate business need to increase staff, and another process when seeking to fill a permanent position associated with a current employee holding a non-immigrant temporary work visa. Additionally, like *Lams*, where a word-of-mouth policy that excluded black employees from learning about promotional opportunities constituted evidence of discriminatory disparate treatment, here, the company's dual method of recruitment both limits the ability of U.S. applicants to learn of the job vacancy and makes it more difficult for U.S. applicants to apply. Therefore, as the company's separate recruiting process is not facially neutral, it is likely to be categorized as discriminatory.

Additionally, an employer's refusal to adequately advertise job openings and instead rely on more ineffective recruitment methods may be discriminatory. Like in *Wells*, where an employer's practice of posting specific position vacancies in physical locations which were generally off limits to a majority of black employees was found to be discriminatory, and *City of Warren*, where an employer's practice of circulating job advertisements in one county but not another was found to be discriminatory against potential black applicants, here, the company complies with DOL's PERM-related job advertisement requirements, but purposefully uses less effective methodology in doing so. The company limits its PERM-related job advertising to the

print version of a newspaper, even though it could expand its advertising reach to the newspaper's website for free, and also limits its internal posting to a hard-copy advertisement at a work location (normally the mail or break room), rather than through a more widely accessible internal online mechanism. This suggests that the company's purposeful reliance on less effective recruitment methods for PERM-related job advertisements is discriminatory.

Forms of recruitment that tend to perpetuate the characteristics of the current workforce may be discriminatory. Like in *Van*, where a company's reliance on word-of-mouth recruitment which perpetuated a low percentage of female applicants was found to be discriminatory, here, the company's current PERM-related advertising methods, combined with the mail-only requirement, result in a low percentage of U.S. applicants. Therefore, the company's recruitment methods perpetuate the characteristics of the current workforce, and are likely discriminatory. Consistent with this notion, the company's burdensome application process for PERM-related job opportunities is likely to be viewed as prima facie discrimination. Like in *Metal Serv. Co.*, where word-of-mouth recruitment policies resulting in a more burdensome path to hiring for black applicants was found to be evidence of discriminatory treatment, here, the company's mail-only requirement for PERM-related job vacancies results in a more burdensome process of application for U.S. applicants. For this reason, the company's recruitment methods are likely to be found to be discriminatory.

Finally, preselection of a candidate, and later use of ineffective recruitment methods because of this preselection, may be discriminatory. Like in *Coble*, where a school district's deviation from its traditional practice of posting notices of available positions in the school buildings, in combination with the inclusion of uncharacteristically specific prerequisites for the vacant position, resulted in discreditation of the district's proffered reasoning for candidate

selection and evinced preselection, here, the company has departed from its standard hiring process and recruitment methods based on the immigration status of the candidate that it wants to emerge from recruitment. When drafting the PERM-associated vacancy announcement, the company looks at the temporary visa holder's role, job description, salary, and duties, and then drafts a job description. The job vacancy announcement often relates to the temporary visa holder's current role. This fact, in conjunction with the notion that "a position [description] specifically tailored . . . to a non-work authorized alien's qualifications so as to exclude equally qualified U.S. citizens" may give rise to an inference of discriminatory preselection, *McNier v. San Francisco State Univ., Coll. of Bus.*, suggests that the company's recruitment methods used with a preselected, temporary visa holding, candidate in mind, are discriminatory.

IV. Conclusion

Various circuits have recognized that ineffective recruitment methods may result in discrimination against a class of victims that did not apply for an employment position. Additionally, preselection of a candidate, and later purposeful use of ineffective recruitment methods because of this preselection, has been found to be discriminatory against a class of victims that did not apply for the employment position. For these reasons, in the litigation at hand, the company's separate recruiting methodology based on whether or not the company seeks to fill a permanent position associated with a current employee holding a non-immigrant temporary work visa, in combination with evident preselection, evinces discrimination against U.S. citizen applicants.